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11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 MUCKTARR KATHER SEI,
aka "Kather Sei,"
18 aka "Kat,"

19 Defendant.

No. CR 21-CR-00244(B)-AB

OPPOSITION TO DEFENDANT MUCKTARR
KATHER SEI'S MOTION TO PLEAD
GUILTY TO COUNT ONE AND TO STRIKE
SURPLUSAGE FROM COUNT ONE (DKT.
183)

Hearing Date: May 20, 2024

Hearing Time: 10:00 a.m.

Location: Courtroom of the
Hon. André Birotte,
Jr.

22
23 Plaintiff United States of America, by and through its counsel
24 of record, the United States Attorney for the Central District of
25 California and Assistant United States Attorneys Patrick Castañeda,
26 Jason C. Pang, and Suria M. Bahadue, hereby files its Opposition to
27 defendant Mucktarr Kather Sei's Motion to Plead Guilty to Count One
28 and to Strike Surplusage from Count One (Dkt. 183).

1 This Opposition is based upon the attached memorandum of points
2 and authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: April 26, 2024

Respectfully submitted,

5 E. MARTIN ESTRADA
6 United States Attorney

7 MACK E. JENKINS
8 Assistant United States Attorney
 Chief, Criminal Division

9 /s/
10 _____
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11 JASON C. PANG
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13 UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Mucktarr Kather Sei is charged in Count One of the Second Superseding Indictment ("SSI") with conspiring with co-defendant Mirela Todorova and others to distribute controlled substances, resulting in one fatal and three near-fatal overdoses.¹ Defendant Sei now seeks to shirk his responsibility for his role in the conspiracy in two ways. First, defendant Sei argues that he cannot be held responsible for the charged death and overdoses resulting from the conspiracy's distribution of fentanyl pills marketed as oxycodone because the SSI alleges that defendant Sei agreed to distribute cocaine, MDMA, and oxycodone -- but not fentanyl. Second, he argues that he should be allowed to plead open to Count One without admitting to the charged facts of the overdoses, each of which increase the mandatory minimum and maximum penalty applicable to Count One.

The Court should reject both arguments as contrary to controlling Ninth Circuit law. As explained further below, the government does not need to prove defendant Sei's intent or agreement to distribute fentanyl to obtain the 20-year mandatory minimum and life maximum enhanced penalties applicable to Count One. See United States v. Collazo, 984 F.3d 1308, 1333 (9th Cir. 2021). In addition, defendant Sei cannot plead open to conspiracy to distribute controlled substances without also admitting that the distributions

¹ Defendant Sei's motion was filed when the First Superseding Indictment ("FSI") was the operative charging document. On April 3, 2024, however, a grand jury returned the SSI. At the April 10, 2024 status conference, counsel for defendant Sei stated that he did not need to revise the motion; accordingly, the government responds based on the allegations set forth in the SSI.

1 resulted in the charged overdoses because a defendant cannot plead
2 open to a lesser-included offense when the government objects -- as
3 it does here. See Burrage v. United States, 571 U.S. 204, 210 n.3
4 (2014) (a "[v]iolation of § 841(a)(1) is thus a lesser included
5 offense of" the crime of distribution resulting in death or serious
6 bodily injury); Collazo, 984 F.3d at 1321 ("any fact which increases
7 a mandatory minimum" also constitutes an "element" of a charged
8 offense, including in § 846 cases) (cleaned up); United States v.
9 Edmonson, 792 F.2d 1492, 1498-99 (9th Cir. 1986) ("a district court
10 in accepting a guilty plea to the indictment, may not, without the
11 government's consent, accept a plea to a lesser included offense").

12 **II. ARGUMENT**

13 **A. Defendant Sei Is Liable for the Fentanyl-Induced Overdoses** 14 **by Agreeing to Distribute Oxycodone**

15 Count One of the SSI alleges that defendant Sei agreed to
16 distribute and possess with intent to distribute cocaine, MDMA, and
17 oxycodone, and that the distribution of fentanyl pills marketed as
18 oxycodone resulted in one fatal and three near-fatal overdoses.
19 Defendant Sei argues that the Court should strike the four overdose
20 allegations as surplusage because Count One does not allege that
21 defendant Sei agreed to distribute fentanyl as an object of the
22 conspiracy, and fentanyl "just happened to be present in certain of
23 the Oxycodone pills." (Mot. at 10-11.)

24 He is wrong. A factual allegation of death and/or serious
25 bodily injury resulting from distribution not only triggers a
26 sentencing enhancement under 21 U.S.C. § 841(b)(1)(C) but constitutes
27 a separate and distinct crime. Burrage, 571 U.S. at 210 n.3;
28 Collazo, 984 F.3d at 1321. Those allegations are thus not surplusage

1 but instead the distinct crime that defendant is charged with
2 conspiring to commit as noted below.

3 Further, the government does not need to allege or prove that
4 defendant Sei agreed to distribute fentanyl in particular. In
5 Collazo, the Ninth Circuit held that, in a drug conspiracy case under
6 § 846, "the government must prove only that the defendant's mental
7 state was the same as if the defendant had been charged with the
8 underlying offense."² 984 F.3d at 1333. It is well-established that
9 for the offense underlying Count One, namely, a violation of § 841,
10 the government does not need to prove that a defendant knew that he
11 was distributing a specific substance or quantity to obtain a penalty
12 enhancement set forth by the statute so long as the defendant knew
13 that it was "some kind of a federally controlled substance." See
14 Ninth Circuit Model Criminal Jury Instruction, No. 12.1 (2022 ed.);
15 United States v. Soto-Zuniga, 837 F.3d 992, 1004-05 (9th Cir. 2016).
16 In order words, "[t]he government does not have to prove that the
17 defendant had any knowledge or intent with respect to those facts"
18 triggering a statutory penalty enhancement under § 846. Collazo, 984
19 F.3d at 1336.

20 As defendant Sei expressly concedes that he knew he was
21 distributing oxycodone, MDMA, and cocaine -- all federally controlled
22 substances -- in furtherance of the conspiracy, it is of no moment
23 that he also claims that he did not agree to distribute specifically
24
25

26 ² Collazo is binding authority on this Court. However, the
27 government intends to heighten its burden of proof at trial that, as
28 to Count One, it was at least reasonably foreseeable to defendant Sei
and his charged co-conspirators that the distribution of what was
marketed as oxycodone pills could have resulted in a fentanyl
overdose or death.

1 fentanyl.³ Defendant Sei is subject to the 20-year mandatory minimum
2 and life maximum penalty enhancements attached to Count One
3 regardless, because he knowingly participated in a conspiracy that
4 distributed a controlled substance, resulting in one fatal and three
5 near-fatal overdoses. This is because "it is not unusual to punish
6 individuals for the unintended consequences of their unlawful acts."
7 Dean v. United States, 556 U.S. 568, 575 (2009) (emphasis in
8 original).

9 **B. Defendant Sei May Not Plead Guilty to a Lesser Included**
10 **Offense of Count One**

11 Defendant Sei also seeks to plead guilty to conspiracy to
12 distribute and possess with intent to distribute cocaine, MDMA, and
13 oxycodone, without further admitting that the conspiracy's
14 distribution of drugs resulted in one fatal and three near-fatal
15 overdoses. In doing so, defendant Sei unilaterally seeks to avoid
16 the specific charge returned by the grand jury in Count One and avail
17 himself of the lower mandatory minimum and maximum penalties. (Mot.
18 at 13-14.)

19 He cannot do so. Such a plea would constitute a plea to a
20 lesser included offense of what is charged in Count One. See Alleyne
21 v. United States, 570 U.S. 99, 113-15 (2013) ("a fact triggering a
22 mandatory minimum alters the prescribed range of sentences to which a
23 criminal defendant is exposed" and therefore "necessarily forms a
24 constituent part of a new offense") (emphasis added); Burrage, 571
25

26 ³ Defendant Sei's citation to United States v. Gonzalez, 683
27 F.3d 1221, 1225 (9th Cir. 2012), does not appear to help him.
28 Gonzalez held that a venue is established when a coconspirator
commits an act in furtherance of a conspiracy in the charging
district.

1 U.S. at 210 n.3 (2014) (a “[v]iolation of § 841(a)(1) is thus a
 2 lesser included offense of” the crime of distribution resulting in
 3 death or serious bodily injury). United States v. Hyde, 520 U.S. 670
 4 (1997), and In re Vasquez-Ramirez, 443 F.3d 692 (9th Cir. 2006), are
 5 therefore inapplicable here because that line of cases applies to
 6 situations in which a defendant is tendering an “unconditional guilty
 7 plea” to the charged offense. Id. Here, defendant Sei’s offer to
 8 plead guilty is not unconditional and certainly not to the charged
 9 offense.

10 Accepting defendant’s argument, moreover, would conflict with
 11 Ninth Circuit law. “[T]he plea contemplated by Rules 10 and 11 is a
 12 plea to the offense charged in the indictment or information, and . .
 13 . a plea to a lesser included offense may not be tendered, and cannot
 14 be accepted by the court, unless the government consents.” United
 15 States v. Gray, 448 F.2d 164, 168 (9th Cir. 1971); Edmonson, 792 F.2d
 16 at 1498-99 (same); accord United States v. Midgett, 488 F.3d 288, 298
 17 (4th Cir. 2007) (“in the absence of an agreement by the Government,
 18 the refusal to accept a plea to a lesser charge is not an abuse of
 19 discretion”); United States v. Carnahan, 684 F.3d 732, 737 (8th Cir.
 20 2012) (citing cases and affirming the district court’s denial of a
 21 defendant’s guilty plea to a lesser included offense not charged in
 22 an indictment because such a plea requires the United States’
 23 consent).⁴ This is because doing so would violate “our system of
 24

25 ⁴ In United States v. Thomas, 355 F.3d 1191, 1196 (9th Cir.
 26 2004), the Ninth Circuit stated that a defendant may plead guilty to
 27 a crime by admitting the “elements of a criminal charge” without
 28 being required to admit to any material facts that would support a
 penalty enhancement because those facts are not “elements of the
 offense.” As the Supreme Court later explained in Burrage, however,
 alleged facts in an indictment that trigger a penalty enhancement,
 (footnote cont’d on next page)

1 separation of powers" by intruding on the United States Attorney's
2 "exclusive and absolute discretion" to "choose the statute that will
3 be charged." Edmonson, 792 F.2d at 1497 (cleaned up). The
4 government does not consent to defendant Sei's demand to plead guilty
5 to the lesser included offense of what is charged in Count One.

6 The government may revisit its position if defendant Sei
7 presents a revised factual basis that admits the Alleyne facts
8 supporting the 20-year mandatory minimum and lifetime maximum penalty
9 enhancements applicable to Count One as charged.

10 **III. CONCLUSION**

11 For the foregoing reasons, the government respectfully requests
12 that this Court deny defendant Sei's requests to plead open to a
13 lesser included offense of Count One and to strike as surplusage the
14 death and serious bodily injury allegations supporting the penalty
15 enhancements for Count One.

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25 such as a death or serious bodily injury resulting allegation, become
26 elements of the charged offense. 571 U.S. at 210 n.3. Indeed, the
27 Supreme Court defined the elements of distribution resulting in death
28 -- the underlying substantive offense of the conspiracy charged here
-- as: (1) "knowing or intentional distribution" of a controlled
substance; and (2) "death caused by ('resulting from') the use of
that drug." Id. Thus, defendant's proposal fails Rule 11's
standards because it does not contain an element of the offense that
he is charged with.